

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2008-0249
Appellant,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LISA DIANNE BRINK,)	Rule 111, Rules of
)	the Supreme Court
Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071570

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellee Lisa Brink was convicted after a jury trial of disorderly conduct. Thereafter, the trial court granted Brink's motion to vacate her conviction on the ground that the jury may not have reached a unanimous verdict. The State of Arizona appeals from that ruling, arguing the court erred when it found Brink's acts had not been part of a single criminal transaction.

¶2 In its opening brief, the state adopted the facts as found by the trial court in its ruling on the motion to vacate. We view those facts in the light most favorable to sustaining the court's ruling. *See State v. Soriano*, 217 Ariz. 476, ¶ 2, 176 P.3d 44, 45 (App. 2008). Brink and the victim, Chris H., had essentially ended their romantic relationship but were still living together in Brink's home at the time of the incident. Chris testified that, on a morning in April 2007, Brink had pointed a gun at him while he was making breakfast and then, over the course of the next several hours, threatened to shoot or kill him. Chris testified Brink had moved him to different places in the home and, at one point, ordered him to undress and stand in the bathtub. She also hit him in the head and leg with the gun. Chris claimed that, when Brink set the gun down, he lunged for it, grabbed it, and ran toward the front door. Brink then caught up with him at the front door, and they struggled over the gun. When they fell out of the doorway onto the ground outside, Chris was lying almost on top of Brink, holding the gun by its side and barrel. Brink had her hand on the trigger. Chris testified he then tried to point the gun at the ground and yelled for help. Two men from a neighboring house responded, and one of the men was able to get the gun and remove the bullets. Brink

maintained she had only handled the gun inside to show Chris she had purchased it and that, throughout the incident, she was the victim and Chris was the perpetrator. She contended that, to the extent she handled the gun outside the house, she was acting in self-defense.

¶3 The state charged Brink with one count each of kidnapping and aggravated assault based on multiple acts both inside and outside the house. After the jury acquitted Brink of the kidnapping charge and found her guilty of disorderly conduct as a lesser-included offense of aggravated assault, Brink moved to vacate the conviction pursuant to Rule 24.2(a)(3), Ariz. R. Crim. P., arguing her constitutional rights had been violated because there was a real possibility the jury had not reached a unanimous verdict on the disorderly conduct charge. After a hearing, the trial court granted the motion, finding the acts inside and outside the house were “separate acts and not part of a single continuing course of conduct.” The court concluded Brink’s “two defenses create[d] the possibility that the jury disagreed as to which of her acts gave rise to her guilt on the disorderly conduct lesser included offense, precluding a unanimous verdict.”

¶4 Whether to grant a motion to vacate a judgment is within the sound discretion of the trial court. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 90, 25 P.3d 717, 743 (2001). However, we review de novo constitutional questions and the court’s ultimate legal conclusions. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004).

¶5 Brink contends the state alleged a single crime—the aggravated assault—but attempted to prove it with multiple criminal acts, which resulted in a duplicitous charge. To

cure the possibility that a duplicitous charge will result in a nonunanimous verdict, a court must either require the state to elect which act it alleges constitutes the charged crime or instruct the jury that it must unanimously agree on a specific act that constitutes the crime. *State v. Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d 844, 847 (App. 2008); *see also State v. Davis*, 206 Ariz. 377, ¶ 65, 79 P.3d 64, 77 (2003) (duplicitous charge creates risk of nonunanimous verdict). Under article II, § 23 of the Arizona Constitution, a defendant has the right to a unanimous jury verdict in a criminal case, and a violation of that right is fundamental error. *Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d at 77.

¶6 “[H]owever, it is not error for the trial court to fail to require such curative measures in those instances in which all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction.” *Klokic*, 219 Ariz. 241, ¶ 15, 196 P.3d at 847. Separate acts are considered part of a single criminal transaction ““when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them.”” *Id.* ¶ 18, *quoting People v. Stankewitz*, 793 P.2d 23, 41 (Cal. 1990); *see also State v. Counterman*, 8 Ariz. App. 526, 531-32, 448 P.2d 96, 101-02 (1968) (two shots fired in succession constituted single continuous offense).

¶7 In *Klokic*, the state had charged the defendant with one count of aggravated assault against another driver but at trial introduced evidence the defendant had pointed a gun at the driver on two separate occasions during a sequence of “road rage” events. 219 Ariz. 241, ¶¶ 5-6, 196 P.3d at 845-46. On appeal, the court found the events were not part of a

single criminal transaction because the defendant claimed multiple, alternative defenses to each act. Thus, we held the trial court had erred in refusing to apply one of the requisite curative measures: either “a prosecutorial election between the separate criminal acts or a jury instruction requiring unanimity.” *Id.* ¶¶ 17-18, 29, 38; *see also Davis*, 206 Ariz. 377, ¶¶ 59, 65, 79 P.3d at 77 (events not part of single criminal transaction when defendant offered separate defenses to each act).

¶8 Here, Brink presented multiple defenses to the acts inside and outside the house. She contended Chris’s allegations about the events inside the house were untrue, that he was the aggressor, and that she was acting in self-defense if she handled the gun outside. To find her guilty of disorderly conduct, the jury was required to find Brink had, “with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, . . . [r]ecklessly handle[d], display[ed] or discharge[d] a deadly weapon or dangerous instrument.” A.R.S. § 13-2904(A)(6).

¶9 Because the members of the jury could each have believed different facts as to each alleged act inside and outside the house and still found Brink guilty of disorderly conduct, there was a real possibility the jurors did not unanimously agree on which particular act gave rise to her criminal liability. For example, some jurors could have believed Brink handled the gun inside the house with the intent to disturb Chris’s peace but, when Chris took the gun and ran outside, she no longer intended to disturb anyone’s peace. Some jurors might have believed she intended to disturb the neighbors’ peace when she was outside. Some

could have believed that Chris was the aggressor inside but that Brink did not act in self-defense outside. Some could have believed she and Chris were both the aggressors inside and outside. *See Klokic*, 219 Ariz. 241, ¶ 30, 196 P.3d at 851 (finding “entirely possible that different jurors believed different facts with respect to each of the acts” and thus reversing based on “distinct possibility that the jury was not unanimous as to the act or acts that gave rise to Klokic’s criminal liability”); *see also Davis*, 206 Ariz. 377, ¶ 59, 79 P.3d at 77 (concluding when court “cannot be certain which offense served as the predicate for the conviction, . . . the real possibility of a non-unanimous jury verdict exists”).

¶10 The trial court did not err in finding the acts inside of the house were separate from those outside the house. Therefore, either the prosecutor should have elected which criminal act to charge or the jury should have been instructed to agree on which act in order to ensure a unanimous verdict. *See Klokic*, 219 Ariz. 241, ¶ 38, 196 P.3d at 852. Accordingly, we affirm the court’s order vacating Brink’s conviction and sentence.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge